



TRIBAL COURT  
OF THE  
LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

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JAMES T. DECKROW,  
Plaintiff,

Case No. C-006-0398

v.

Decision After Hearing

LITTLE TRAVERSE BAY BANDS  
OF ODAWA INDIANS,  
Defendant.

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OPINION OF THE COURT

This matter came before the Tribal Court for a **Hearing** on the merits of the Complaint and Answer on March 27, 1999. The Court has had the opportunity to carefully listen to the taped record of the Hearing and duly consider the evidence and argument presented by the parties.

Tribal member Plaintiff asks the Court to declare the advisory election conducted by the Tribe to receive input from tribal members on the Indian Judgment Fund distribution proposal invalid. He argues that the ballot language is so ambiguous as to deprive him of his right to cast an informed vote. Additionally, he complains that the ballot only contains one distribution proposal. Plaintiff argues that tribal members were lead to believe that they would have the opportunity to select from at least two proposals. He argues that elections must provide two choices, as an election provides at least two candidates for a single office.

Defendant argues that there is no legal authority for the Court to disallow the results of an election that is merely advisory. Additionally, Defendant argues that there are no legal grounds for the relief requested because the advisory election was not required by law, either federal or

tribal, and that there was no showing by Plaintiff that any tribal laws were violated.

Early on in the present action, this Court denied **Defendant's Motion To Dismiss** this action because it appeared to the Court that confusion might exist regarding how questions that tribal members had about the election/distribution plan could be answered and by whom. In the Court's written ruling on the **Motion** the Court said "... *only full fact-finding will provide the Court the opportunity to determine whether the questions of the Plaintiff were procedural, substantive, or both; distinguish between the types; and determine what actions each of the parties took to ask and answer Plaintiff's questions.*" The Court distinguished between procedural questions about the election process that should only be answered by the Election Board and substantive questions about the distribution plan that can only be answered by the Tribal Council. The potential for confusion that the Court saw, at first blush, was the general written instruction that **any** questions should be referred to the Election Board. There was no distinction for the two very different kinds of questions.

The potential for confusion identified by the Court due to the apparent failure in the written instruction by the Election Board to distinguish between procedural, or election process, questions and substantive, or distribution proposal, questions did not materialize in the instant matter. Instead, the claimed ambiguities by Plaintiff are all substantive, or distribution proposal, questions. There was no evidence presented by the Plaintiff that there was confusion about to whom questions could be directed.

The Court agrees with Defendant's argument that there is no legal basis for the Court to declare the advisory election invalid. Nothing in the Tribal Constitution, tribal statutes or federal law provides the legal authority or grounds for the Court to grant the relief requested. Therefore,

in order for the Plaintiffs to prevail in the instant matter the Court must determine that equity, or fairness, compel it to exercise its inherent authority to ensure fairness. Equity relief is discretionary, and extraordinary. Thus, the Court has carefully considered the facts, as shown at the Hearing, in their totality and in the appropriate context.

The Court has reached the following conclusions in its consideration of whether fairness requires the Court to grant the extraordinary relief requested:

- (1) There has been no showing by Plaintiff that the claimed ambiguities caused widespread confusion or created a vast misunderstanding among tribal voters as to effectively deprive them of their right to make fully-informed votes. Plaintiff and his tribal member wife were alone in their argument to the Court that the language was ambiguous. No other tribal members testified that they were confused or could not get answers to questions they might have had about the distribution proposal. Defendant did testify that “hundreds” of questions were asked and answered by tribal officials regarding the distribution plan. Defendant offered the testimony as evidence that the mechanism employed by tribal officials to have questions asked and answered worked. The Tribal Chairman testified in detail about the mechanism, how it worked and what kinds of questions that were asked. Plaintiff’s spin on this testimony is that it is evidence of ambiguity. The Court is far from convinced that the fact that there were questions about the distribution proposal necessarily means that it was ambiguous. Defendant testified in great detail about the “extraordinary effort” that went into soliciting feedback and input from tribal members in the development of distribution proposals; development of

numerous draft proposals, including a review of their “understandability”; the conduct of a tribal membership meeting to discuss and consider various distribution proposals and ideas; and the preparation of the ballot language by the Tribal Council, including again a review of “understandability”. All of that evidence demonstrates the effort that the Tribal Council and the tribal staff put into answering questions and presenting an understandable proposal to the membership for their input. In the context of all the effort, does an assessment of fairness lead the Court to the conclusion that it should declare the election invalid because Plaintiff had questions? The Court would expect that the election results would be much more mixed than there were if there was widespread misunderstanding about the distribution proposal. The vote, in fact, was 1108 in favor and only 117 opposed.

- (2) There was no showing by the Plaintiff that he sought to ask questions that he had about the distribution plan prior to the filing of this legal action. It was, however, pointed out to the Court that a settlement meeting was scheduled after this action was filed but did not occur. On the other hand, Defendant presented evidence of ample opportunity for tribal members to raise concerns, issues and questions. Plaintiff apparently did not take advantage of any of those numerous opportunities. Plaintiff argues that he is well within his legal rights to go ahead and file this action without having made any real attempt to have his questions answered beforehand. Principles of equity jurisdiction require that those who would invoke equity powers of a court must have acted reasonably and fairly themselves. Is it

reasonable for one not to take advantage of the numerous opportunities provided to participate, ask questions and provide feedback and to then later complain in the Court that he has questions. The Court thinks not. Additionally, the equity powers of the Court should only be invoked when not to do so would result in fundamental unfairness. That is not the case here because of opportunities that were available to Plaintiff to have his questions answered.

- (3) The Court agrees with Defendant's assertion in closing argument that Plaintiff's Complaint is nothing more than a series of questions; questions that were answered during the hearing by Defendant; and which could have been asked and answered prior to the election.
- (4) Plaintiff complains that he was deprived of any real choice because the advisory ballot presented only one distribution plan instead of two. Defendant testified how a tribal member presented at the tribal membership meeting an alternative proposal that combined the essential elements of the two competing desires of tribal members for distribution. The Court recognizes that Plaintiff did indeed have an election choice. He could vote yes or vote no. Referendum questions are commonly asked just that way and do provide a choice for voters.

FOR ALL OF THE FOREGOING, Plaintiff's request for relief is hereby DENIED.

9/30/99

DATED

Michael Petoskey  
Tribal Judge

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For Request

**J. COURT  
THE  
BANDS OF ODAWA INDIANS**

**JAMES T. DECKROW,**  
Plaintiff,

Case No. C-006-0398

v.

Ruling on Defendant's  
Motion To Dismiss

**LITTLE TRAVERSE BAY BANDS  
OF ODAWA INDIANS,**  
Defendant.

**RULING ON DEFENDANT'S MOTION TO DISMISS**

This matter comes before the Tribal Court on remand from the Tribal Appellate Court. The Tribal Court entered an **Order of Dismissal** in this matter on May 27, 1998 after Plaintiff failed to appear at the *Hearing on Defendant's Motion For Summary Disposition* held that day. Plaintiff appealed the dismissal and it was overturned by the Appellate Court on October 22, 1998. The second time the matter was scheduled for a hearing on Defendant's *Motion For Summary Disposition* on December 11, 1998 Plaintiff did appear.

*Defendants raise several affirmative defenses in their Answer to Plaintiff's Complaint.*

Those defenses are that:

- (1) the claims of the Plaintiff are barred by his failure to exhaust the administrative remedies provided by tribal election ordinances;
- (2) the claims are barred by the sovereign immunity of the Defendant;
- (3) the Court lacks jurisdiction over Plaintiff's claims;
- (4) the Court lacks jurisdiction over the Defendant; and
- (5) the Plaintiff has failed to state a claim upon which relief can be granted.

The Court will address these defenses one-by-one:

(1) *Plaintiff's failure to exhaust administrative remedies* - Defendant argues that Plaintiff is barred from seeking relief from the Court because he failed to seek the relief provided by the tribal election ordinances. The reasons for the requirement of administrative exhaustion as a condition precedent to access to the courts are well-established in the laws of other jurisdictions. This Court should at least consider those underpinnings. The primary underpinning is that deference ought to be given to these particular bodies because they have focused, limited responsibilities. Through that limited focus it has developed expertise by its specialization. This specialization creates competence and efficiencies in government. The courts should not be put into the position of "second-guessing" each and every administrative decision or action. That kind of micro-management is not conducive to the development of administrative body capacity to realize their potential to serve the community. If there is a problem or complaint with a particular body or its actions, that body ought to have the first opportunity to address any concerns raised. If the administrative body cannot resolve the concern then, and only then, should the matter be pursued elsewhere.

It appears to the Court that confusion existed about how tribal members could get answers to questions they might have had about the election. Not all questions are created equal. They simply are not all the same. For example, some questions about tribal elections are procedural questions, i.e. about the election process itself or how the election is conducted, while other questions may be about the substance or content of the ballot choices. It is very important to distinguish between what is procedural and what is



substantive. This distinction is critical in tribal election matters because only the Election Board can answer procedural election questions while, on the other hand, only the Tribal Council can answer questions about the content of a ballot proposal like the one present in a referendum. The Election Board is delegated sole responsibility to conduct tribal elections. The delegation is made to insulate the election process from political influences. Only the Election Board can answer questions about the process. On the other hand, the Tribal Council has complete providence over the political affairs of the Tribe. Only that body can answer the substantive, content-related political questions that arise in a referendum. Thus, the distinction is critical. Effective referral and address of questions require an understanding and implementation of the distinction.

It is said that hindsight is 20/20. Well, maybe sometimes, but taking advantage of opportunities to improve and fine-tune government should be given every consideration based upon "lessons learned" and the principle of continuous improvement. Therefore, this Court respectfully suggests that it might be helpful to adopt this distinction and incorporate it in future elections and their documents, when and where appropriate.

In the instant matter, only full fact-finding will provide the Court the opportunity to determine whether the questions of the Plaintiff were procedural, substantive, or both; distinguish between the types; and determine what actions each of the parties took to ask and answer Plaintiff's questions.

This matter cannot be dismissed for failure to exhaust administrative remedies because of the apparent lack of clarity of how election questions should be presented and who could answer them.

(2) *The claims are barred by sovereign immunity* - Defendant argues that it is immune from suit because it is a federally-recognized Indian tribe. Indian tribes enjoy sovereign immunity under federal law unless the immunity has been expressly waived by the U.S. Congress or by the tribe itself. The issue that must be addressed by courts is whether there has been an express waiver either by Congress or the Tribe.

Sovereign immunity is an English-law doctrine that "the king can do no wrong." One cannot sue the king. This ancient doctrine came to this country with the adoption of English law as the legal foundation for the development of law in the new United States. A new country was superimposed over numerous indigenous Native communities. Each with their own political structure and tribal law. Since that earlier time, many non-Native governments have waived their immunity in various areas to provide redress for government negligence and wrongdoing. Reasons for the various waivers might be generalized to say that the people of a representative democracy realize that "the king" can do wrong and does make mistakes. After all, government is a human institution and the maxim "to err is human" is undisputed. Fundamental fairness requires that there be an opportunity for redress, surely in everyone's book. However on the other hand, governmental immunity ensures that no one can "break the bank" by a bank-breaking award of tribal assets. No one wants to see the government bankrupted. It seems reasonable to expect the Tribal Council to look at these various considerations and develop well-reasoned positions on immunity as it relates to this tribal community. After all, this is not England. We do give a lot of lip-service to the fact that Indian communities are different than those of dominant society. We point out that our judicial and legal

systems need not be mirror images of those of dominant society. If that is truly the case, why should tribal government adopt the Anglo-American concept of sovereign immunity? Rather, why shouldn't tribal sovereign immunity mirror tribal culture? It is difficult to imagine that an outdated ancient English doctrine fits this tribe's needs. Importantly, the Court recognizes that these policy questions are political questions that can only be addressed by the Tribe's political body. Thus, the Court respectfully suggests that Tribal Council duly deliberate on these issues, rather than relying on the Tribal Court to simply dismiss everything based upon arguments of sovereign immunity.

ARTICLE VIII of the Tribe's Interim Constitution entitled "Bill of Rights" expressly provides that members have "... the right to petition for action or the redress of grievances ...". This is the supreme law of the Tribe because the Tribal Constitution is the supreme law. It is the people's expression of its delegation of power to the government. The right to petition for action or redress would be rendered meaningless if sovereign immunity is deemed to be a bar. If the provision is meaningless, why the expression of a right? Why bother? The expression must have a purpose, otherwise the language would not be included. Thus, the Court construes the cited constitutional provision to be an express waiver of sovereign immunity by the Tribe. Whether the "Bill of Rights" provision of the Interim Tribal Constitution is construed a reservation of the power in the people or a waiver of immunity by those who drafted its provisions is not significant for the purposes of deciding the instant matter. It is still an express waiver. For all of the foregoing, sovereign immunity is not a bar to this action.

(3) *The Court lacks jurisdiction over Plaintiff's claims* - Defendant argues that the Court has no authority to hear the claims raised by the Plaintiff. However, the LTBB Tribal Court Statute, enacted December 17, 1995, which establishes the Tribal Judiciary gives it jurisdiction over claims like that of Plaintiff. That Statute creates "... a court of general jurisdiction." See Section II(A). As such, the Court's jurisdiction is not limited to hearing only certain kinds of cases or controversies. The Court is empowered to hear "... all cases arising ..." (bold added for emphasis) under tribal law or based upon the Tribe's inherent jurisdiction. Thus, the Court has the authority to hear this matter.

(4) *The Court lacks jurisdiction over the Defendant* - Defendant argues that the Court has no power over it. This is the same argument that the Tribe is immune from suit. That argument is addressed by the Court above. The Court incorporates its reasoning and ruling to the second affirmative defense above. Thus, this affirmative defense fails.

(5) *Plaintiff has failed to state a claim on which relief can be granted* - Defendant argues that the Plaintiff has failed to state a claim on which relief can be granted.

Plaintiff's claim is that the ballot language was "ambiguous" and "confusing" thereby depriving him of the opportunity to cast an informed vote. The Court incorporates its reasoning and ruling to the third and fourth affirmative defense above. Thus, this affirmative defense fails.

~~FOR ALL OF THE FOREGOING~~, this Honorable Court rejects all of the Defendant's arguments and denies the Defendant's Motion to Dismiss. This Court will schedule this matter for a hearing on the merits.

2/22/99

DATED

Michael Petoakey  
Chief Judge